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IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1975
No. 75-883

MATTHEW DAVID WEINTRAUB,
Petitioner,

v.

THE PEOPLE OF THE STATE
OF CALIFORNIA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SECOND DISTRICT COURT OF APPEAL FOR THE STATE OF CALIFORNIA

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TO THE SECOND DISTRICT COURT OF APPEAL
FOR THE STATE OF CALIFORNIA:

Petitioner Matthew David Weintraub respectfully prays for a Writ of Certiorari to the Second District Court of Appeals of the State of California, to review its judgment affirming his conviction and the imposition of a prison sentence with probation granted upon condition that he serve time in the County Jail.

OPINION BELOW

The trial was by court with the defendant being found guilty of violating California Health & Safety Code Section 11530.5 (possession of marijuana for sale) and not guilty of Health & Safety Code Section 11910 (possession of dangerous drugs). The California District Court of Appeal affirmed the conviction in an unpublished opinion attached as Appendix "A".

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The statutory provision believed to confer on this Court jurisdiction to review the judgment in question by Writ of Certiorari is 28 U.S.C. Section 1257(3).

QUESTION PRESENTED FOR REVIEW

Can the State of California uphold the conviction of petitioner where there is no evidence to support the charge and where the only crimes committed, if there were any, were outside the United States and therefore not within the jurisdiction

of the State of California?

STATEMENT OF THE CASE

Petitioner Weintraub was arrested on March 6, 1973, and charged with violations of Health and Safety Code Section 11530.5--possession of marijuana for sale, and 11910--possession of dangerous drugs. A preliminary examination was held before Judge Antonio E. Chavez in Division 34 of the Los Angeles Municipal Court on May 21, 1973, and the defendant was held to answer on those charges (C.T. 22). An Information was filed on June 4, 1973 (C.T. 24, 25), and petitioner was arraigned and entered a plea of not guilty on June 12, 1973 (C.T. 27).

On November 28, 1973, motions pursuant to Penal Code Sections 995 and 1538.5 were argued before the Honorable William P. Ritzi in Department 115 of the Los Angeles Superior

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References to the record are: (C.T.) Clerk's Transcript No. A295241; (Supp. C.T. 3/22/74) Supplemental Clerk's Transcript of March 22, 1974; (Supp. C.T. 5/9/74) Supplemental Clerk's Transcript dated May 9, 1974; (R.T.) Reporter's Transcript on Appeal; (Supp. R.T.) Reporter's Supplemental Transcript on Appeal; Affidavit accompanying Search Warrant No. 10059.

Court (R.T. 4-7). The motions were submitted on the basis of the Preliminary Hearing Transcript and a Memorandum of Points and Authorities by defense counsel (Supp. C.T. 3/22/74,1-12). The motions were denied.

The case was ultimately submitted on the transcript and the trial court found the defendant not guilty of Count I and guilty on Count II (Supp. R.T. 3; Supp. C.T. 1).

From this finding a Notice of Appeal was filed April 30, 1974 (Supp. C.T.3), properly bringing the conviction before the District Court of Appeal for review. On July 31, 1975, that court affirmed the judgment (see Appendix "A").* A Petition for Hearing was then timely presented to the California Supreme Court, which was denied on September 24, 1974 (Appendix "B"). This case is now properly before this Court under 28 U.S.C. Section 1257(3).

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*The court's treatment was so embarrassingly cavalier that it affirmed petitioner's conviction for Calif. Health & Safety Code §11359 (Appx. "A", p. 1) with which he was never charged and is clearly ex post facto since it never existed at the time he committed the acts for which he was tried, becoming effective on Oct. 1, 1973, almost seven months after petitioner's arrest.

STATEMENT OF FACTS

Since petitioner was found not guilty on Count Two of the Information (Supp. C.T. dated 5/9/74), the constitutional guarantee against double jeopardy requires only that the facts relevant to the possession for sale conviction be set forth.

According to the testimony introduced into the record at the Preliminary Hearing, the package, containing the hashish on which petitioner's conviction rests was brought to the attention of the police by customs authorities at some time prior to its delivery to petitioner Weintraub's residence (C.T. 11, 12). The package--which the police knew to contain hashish--was delivered to the Weintraub household at approximately noon on March 6, 1973. Petitioner was not home at that time and the package, addressed to Kathy Swanson, c/o Max Winthrop, at the Weintraub address (C.T. 10) was signed for and accepted by petitioner's mother (C.T. 14). Approximately an hour later, she started to leave the premises, was detained by officers, and responded to their questions by saying that although she knew

neither of the named addressees, she had signed for the package because her son's name was Maxwell (Affidavit accompanying search warrant No. 10059)(Exhibit "A"). An Officer Nichols testified that upon his return, he was admitted to the house by his partner, who was already inside and had taken all the occupants--and the package--into custody (C.T. 12). The suspect package was in full view of the officers on the hall table where it had been brought previously by Mrs. Weintraub (C.T. 13).

It was during the interim period--after Customs Agent Hamm and an Officer Sirk had entered the premises, but before Officer Nichols returned with the warrant--that petitioner arrived home. Agent Hamm testified that upon his arrival, Weintraub was arrested and read the Miranda warnings (C.T. 15). At that time the petitioner indicated his willingness to speak to the officers (C.T. 16).

About 8:00 o'clock that evening, after being taken to the police station and reminded of his rights, petitioner made a statement (C.T. 18). He explained

that he had visited Amsterdam the previous summer and met some people who said they could get him some hashish. He thought nothing more about this until he returned and made the casual acquaintance of a Steve Shapiro at U.C.L.A. They entered into an agreement whereby Weintraub was to pay Shapiro's transportation costs to Amsterdam if he would send hashish back to California. Towards that end, Weintraub gave Shapiro $2,000.00, but stated that by March 6 he had already written the money off (C.T. 19, 20).

REASONS FOR GRANTING THE WRIT AND AMPLIFYING THE SAME

I

PETITIONER WEINTRAUB'S CONVICTION FOR POSSESSION OF MARIJUANA SHOULD BE REVERSED BECAUSE THERE IS NO PROOF THAT THE CRIME CHARGED (A) WAS COMMITTED AT ALL AND, (B) IF COMMITTED, WAS COMMITTED WITHIN THE STATE OF CALIFORNIA AS REQUIRED BY THE UNITED STATES CONSTITUTION

(A) Taking every piece of evidence appearing in the transcript of the Preliminary Hearing as true, there was

insufficient showing that petitioner Weintraub committed the crime of which he stands convicted, namely, possession of marijuana for purposes of sale. The evidence, at best, showed only that Weintraub visited Amsterdam, Holland, in the summer of 1972 and it was suggested to him that he might be able to purchase hashish. Sometime during the school year of 1972 or 1973, Weintraub gave $2,000.00 to a Steve Shapiro with whom he was slightly acquainted, and asked him if he would travel to Amsterdam and try to purchase four pounds of hashish for Weintraub. At the time of Weintraub's arrest, on March 6, 1973, he had virtually written off any hope he may have earlier entertained that the marijuana could and would be purchased and could and would be transmitted to him. That, in sum and substance, was the totality of the evidence against petitioner on the possession for sale charge. This defect is a serious violation of the Federal Constitution in that no conviction may be upheld without violating due process absent evidence to sustain it. Garner v.

Louisiana, 386 U.S. 157, 82 S.Ct. 248 (1961); Thompson v. Louisville, 362 U.S. 199, 80 S.Ct. 624 (1960).

The defense strongly contends that this evidence recited above was insufficient to support a conviction for the offense of possession of marijuana for purposes of sale. There is absolutely no proof that Weintraub ever had possession of the marijuana.

The elements of illegal possession of marijuana are: (1) physical or constructive possession thereof, and (2) knowledge of the presence and narcotic character of the drug. People v. Newman, 5 Cal.3d 48, 95 Cal.Rptr. 12, 48 P.2d 132 (1971); People v. White, 71 Cal.2d 80, 75 Cal. Rptr. 208, 450 P.2d 600 (1969); People v. Groom, 60 Cal.2d 694, 36 Cal.Rptr. 327, 388 P.2d 359 (1964); People v. Redrick, 55 Cal.2d 282, 10 Cal.Rptr. 823, 359 P.2d 255 (1961).

From the record it is quite clear that the petitioner was never in physical possession of the package containing the hashish. The mail delivery was at noon, the officers entered the residence at

approximately 1:00 o'clock, and petitioner Weintraub did not arrive on the scene until around 3:00 P.M. Since the petitioner had not been present when the package was delivered, and since the officers had taken custody of the premises prior to petitioner's return, it is hard to see how it could be concluded that he had exercised any dominion or control over the hashish.

Although it is conceded that the state may rely on circumstantial evidence to infer possession, People v. Newman, supra; People v. Groom, supra; People v. Francis, 71 Cal.2d 66, 75 Cal.Rptr. 199, 450 P.2d 591 (1969), the facts will not support even a finding of constructive possession. The great majority of the cases reaching the constructive possession issue deal with contraband recovered either from the premises of the accused or a vehicle in which he was a passenger. These situations differ from the present circumstances in that they support an inference that a defendant had previously been in actual possession, Groom, supra, or at the very least, was in a position

to assert an immediate right to control. People v. Showers, 68 Cal.2d 639, 68 Cal. Rptr. 459, 440 P.2d 939 (1968). Since the officers took custody of petitioner Weintraub immediately upon his appearance at the scene, and since at the time he was last present at his home the package was still in the possession of the authorities and unknown to him, to argue that he even constructively, or inferentially possessed the contraband is inconsistent with the facts.

There are relatively few reported decisions dealing with the exact fact situation of a defendant being charged with possession of contraband intercepted in the mails before delivery to him, but those petitioner has discovered, are not inconsistent with his position.

In People v. Kosoff, 34 C.A.3d 920, 110 Cal.Rptr. 391 (1973), the court, in reversing and remanding, denied a motion to suppress evidence, but was cognizant of the problem which troubled the Florida courts--to wit, the propriety of inferring the essential knowledge element from the mere receipt of an unopened package.

"The delivery of the packages to the defendant did not relieve the People of the burden of proving at trial that the defendant knew of the narcotic content and intended to exercise dominion and control over it."
34 C.A.3d at 933, 110 Cal.Rptr. at 399-400.

The decision left open the possibility that in a proper case, a court would hold insufficient the prosecution's proof of possession from the mere fact of being the recipient of mailed contraband. The instant case presents just such a set of circumstances.

In People v. Superior Court (Marcil), 27 C.A.3d 404, 103 Cal.Rptr. 874 (1972) and Weber v. Superior Court, 30 C.A.3d 814, 106 Cal.Rptr. 593 (1973), the appellants' convictions were affirmed, but both cases are distinguishable from the case at bar in two very important particulars. First, the suspect packages in those cases had been personally received by the defendants in question, which fact made out a much stronger case for the knowing possession

of the packages. Since the hashish at issue in this case was delivered during the time of Weintraub's absence, he could not be said to knowingly have possessed it. And secondly, petitioner, not being aware of the existence of the package prior to his being taken into custody, could hardly be held accountable for a knowledge of the illegality of its contents. Neither was the package in question opened--as it was in Weber and Marcil--nor did petitioner Weintraub make the kind of inferably incriminating references to the packages that defendants Weber and Marcil made. How could he when he was unaware of the very existence of the packages containing the marijuana at the time he was taken into custody? Another recent California decision upholding a possession conviction in the postal context is even more readily distinguishable since the defendants opened the package and were overheard by the concealed officers to make incriminating statements prior to their arrest. People v. Sloss, 34 C.A.3d 74, 102 Cal. Rptr. 583 (1973).

The logic of petitioner's position is inescapable. He was charged with and convicted of possession of marijuana for sale. But the prosecution has never made out a prima facie case on this charge, since at the time of his arrest, Weintraub was unaware of the very presence of the parcel in his home--much less the narcotic character of its contents. Even when supplemented by petitioner's extra-judicial statements, no case for possession can be made out.

Rather, the evidence merely showed a desire at one time on his part to obtain marijuana from Amsterdam, Holland, if it was available. The question of whether a Federal offense was committed having to do with smuggling or the wrongful importation of contraband or whether there was a conspiracy or attempt to do so is beside the point. What is precisely the point here is that the record does not contain facts sufficient to uphold a conviction for possession of marijuana for sale--the offense charged. Although the petitioner's extra-judicial statements may make out some sort of case against

petitioner, it is patently obvious that the prosecution has failed to establish two essential elements of the possession for sale offense charged--namely, knowing possession and knowledge that the thing possessed is contraband. The conviction must be reversed. Garner v. Louisiana, supra and Thompson v. Louisville, supra.

(B) The petitioner's conviction should be reversed for the additional reason that the petitioner's acts within the State of California were insufficient for California courts to have jurisdiction over the offense for which he was convicted.

> "It is a general rule of universal acceptation that one state or sovereignty cannot enforce the penal laws of another, nor punish offenses committed in and against another state or sovereignty.

United States v. Volpe, 113 Conn. 288, 155 A. 223, 226, 76 A.L.R. 1083; Rest. of Conflict of Laws, Section 428, Comment e; Reass v. United States (4th Cir. 1938),

99 F.2d 752, 755. California, in the instant case, has upheld the penal regulation of conduct beyond its own territorial jurisdiction and without even so much as the benefit of statute. This it cannot do. Cf. Foley Bros. v. Filardo, 336 U.S. 281, 284-286, 69 S.Ct. 575. Although the Foley Bros. case was willing to concede that Congress, through its constitutional authorization, could legislate in such a way as to effect behavior in and with foreign countries, the State of California has no such constitutional calling card. In California, at least as early as People v. MacDonald, 24 C.A.2d 703, 76 P.2d 121 (1938), it has been clear that even if the charge were as non-substantive as conspiring to or contracting to do an illegal deed, a sufficient quantum of substantive effort must have been committed within the jurisdiction of California for its courts to apply the California Penal statutes to anyone. In People v. Buffum, 40 Cal.2d 709, 256 P.2d 317 (1953), the Supreme Court of the state upset the convictions of Dr. Buffum, a physician and surgeon, and Reginald L. Rankin, his cohort, both

of whom had been convicted on various counts of conspiring to commit abortions. First, let us note that the crimes in Buffum, involving a conspiracy as opposed to a completed misdeed, require far less proof than in the present case. Bearing that in mind, let us scrutinize the Buffum case in order to ascertain whether it assists in analyzing the present predicament, and whether any attempted distinction which can be proffered is whimsical. Dr. Buffum interviewed four pregnant women in his Long Beach office who sought his aid in inducing miscarriages. He took the telephone numbers of three of the women, telling each that she would receive a call. In the fourth case, the woman was given co-defendant Rankin's telephone number. Rankin later telephoned the three, made arrangements for the amount they must pay for the abortion, arranged to meet them at a designated intersection in Long Beach, indicated he would transport them to the place where the abortions were to be performed, met them at the appointed place, drove them in his automobile from Long Beach, California to the Mexican border

and across to Tijuana, Mexico. There, Rankin and another committed the abortions on the women. While in the operating room, three of the women paid Rankin for the performance of the abortion. Later, on the same day, Rankin returned the women to Long Beach. In the case of the fourth woman, she utilized the telephone number of Rankin, given to her by Dr. Buffum for the express purpose of calling Rankin and arranging the abortion, and subsequently, it was consummated in the same fashion as described above. After the four women returned to Long Beach, three of them required hospitalization and were treated by Dr. Buffum without any preliminary examination or inquiry as to the nature of their illnesses. Parenthetically, he reimbursed the families for the hospital bills, which, while an act of wisdom under the circumstances, hardly voided a conspiracy, if there was one. Needless to say, the activities of Buffum and Rankin, both of whose cases were reversed, although charged with a conspiracy rather than the completed crime, were far more incriminatory and complete than the activities

of petitioner Weintraub. It is hard to conceive of how Weintraub's hope based upon information given him while visiting Amsterdam in the summer of 1972 and his subsequent investment of $2,000.00 to a casual acquaintance for purposes of seeking to carry out that chore, without more, can measure up to the offense of possession of marijuana for sale within the jurisdiction of the State of California.

Not only have Buffum and MacDonald and other cases stood the test of time, but as recently as two years ago, the District Court of Appeal in People v. Utter, 24 C.A.3d 525, 101 Cal.Rptr. 214 (1972) (and with a hearing denied by the California Supreme Court on July 5, 1973), voided a conviction of murder where the defendant induced the victim in the State of California to undertake a fatal trip abroad, purchased tickets for her transportation, acquired the murder weapon, because the acts committed within the jurisdiction of California were insufficient to justify the conviction of murder. There, the victim was a married woman in her fifties, who enjoyed a substantial

income from various investment properties in Los Angeles County. The defendant had known her for a number of years and had, in fact, been the salesman who handled one or more of her significant transactions. He subsequently became a real estate broker and occupied space in the victim's building. (The defendant for about fourteen years had used the alias Thomas Devins.) Utter, or Devins, and Mrs. Wilson intensively discussed the trading of certain properties and his involvement in her business. Mrs. Wilson's attorney became concerned about the shady nature of the transactions and so advised her. The defendant, Utter, was supposed to meet with her attorney and, although there were numerous meetings scheduled, he never appeared. He later claimed a property transaction favorable to himself had already been consummated. In a subsequent lawsuit, the defendant was due to appear and again failed to show. Finally, a meeting ensued between the defendant and the victim and the victim's attorney in which the attorney suggested to the defendant that he refund a $5,000.00

deposit and terminate the litigation on one case. The defendant agreed to cooperate and return a number of deeds used in a sequence of transfers of property. He did neither, however. At a later time, the defendant apparently scheduled a meeting in Montreal with Biafra refugees whom he claimed had funds to invest. The victim's attorney was skeptical in that he wondered why the refugees couldn't come to the United States. On at least a couple of occasions, and perhaps more, he advised the victim that she was dealing with a man who was obviously dishonest. The defendant's associate gave testimony verifying that dishonesy and a plethora of other misrepresentations concerning his dealing with the properties affecting the victim. A Dr. Samuel Abraham added to this assessment in detail. Finally, Mr. Wilson, the victim's husband, visited Dr. Abraham to report that his wife was missing. The defendant stated that the victim had left him in Switzerland. He thought she might have gone to Hawaii because she liked the Orient and was not getting along with her husband. Although

there are many, many more details showing the defendant's wily schemes and his intent to have her leave the country for a purpose subsequently made manifest, we mention only several. It was learned that the victim's airline ticket was made out from Los Angeles to Montreal to New York to Madrid to Lisbon and paid all the way through. There were two other similar tickets for this itinerary--one for Robert Forget, and the other for the defendant. The defendant told the victim's husband that he had returned to Los Angeles and that the victim had received a large quantity of cash and was intending to leave Geneva, where he last saw her, and was intending to visit a health spa in Sweden. As to the real estate shenanigans, the defendant declined to discuss the matters, claiming they were confidential. The defendant was invited to attend a meeting of the family and friends to assist them in ascertaining what could have happened to the victim. He did not appear and all private efforts to locate her proved futile. Forget, who had the same paid airline itinerary, testified against the defendant and among other

things, pointed out that after November, 1968, the defendant continued to inquire as to whether Forget was interested in participating in a plan to liberate Moise Tshombe in a plan involving millions of dollars. The defendant agreed to send for Forget immediately, told Forget to bring his .38 automatic and shoulder holster, and meet at the Los Angeles airport. They did. Utter then, for the first time, mentioned that the victim would meet with them in Montreal to complete a real estate transaction, and cautioned Forget (that's his name for real), not to mention the Tshombe affair to the victim. The trio travelled from Montreal to New York to Madrid. In a hotel in Madrid, the defendant discussed with Forget "killing Mrs. Wilson," suggesting that Forget should do it. Defendant discussed in detail shady financial transactions, getting rid of her body, and ultimately Forget became fearful that he might be shot. Forget's .38 automatic was confiscated by Spanish authorities but the defendant's Browning automatic was not discovered. The three left Spain for Tangiers and a little later the defendant

paid Forget to return to the United States. A few days later, the defendant called Forget from Los Angeles and invited him to come get his money, $25,000.00, which shocked Forget, since he had done nothing for Tshombe. Forget did receive $10,000.00 and was driven around town by the defendant in his 280SL Mercedes Benz. During one of these around-the-town trips, Forget asked about the victim. The defend- and then opened the glove compartment of his Mercedes and exhibited the defendant's passport and her jewelry wrapped in a handkerchief. The defendant told Forget that merely one of the gems, a green stone, was worth $30,000.00. Later, the defendant looked at Forget and pointed his right hand at Forget's temple, saying, "She never felt a thing, it's amazing what a 9 millimeter will do. The whole side of her head came off." He further disclosed that he had disposed of her coat in a locker at a bus or railroad depot. The defendant devised a number of other inconsistent explanat- ions for his activities which are too numerous to recount without the writing of a book. Subsequently, bloodstained

clothes of the same blood type as the victim were found in a box at a railway station in Geneva, Switzerland. The Browning 9 millimeter was purchased by the defendant under his alias as Devins in a Hollywood gun shop shortly before the trip abroad. The Utter court followed the Buffum decision, voided the murder conviction, and the Supreme Court denied a hearing. Clearly, the Utter case involved more activity in the State of California than does the present one and obviously more grievous misdeeds.* Therefore, the case before the court should be reversed and dismissed.

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* The District Court of Appeal opinion (see Appendix "A") does not cite any of these cases or discuss them. In fact, the entire opinion cites only one decision.

CONCLUSION

For the aforegoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

LUKE McKISSACK

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Matthew David Weintraub